SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000278-001 DT 11/14/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA F TYLER RICH

v.

ADAM R MORALES (001) THOMAS M STANLEY JR.

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #20029015270

Charge: 1) ASSAULT-TOUCHED TO INJURE

DOB: 10/30/80

DOC: 04/19/02

This Court has jurisdiction of this criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since its assignment on October 15, 2003. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, exhibits made of record, and the memoranda submitted by counsel.

In reviewing the file in this case, this Court noticed that Appellant filed a Motion to Strike on August 4, 2003, and failed to provide a copy to this court. Having reviewed that motion, Appellee's response, and Appellant's reply, and good cause not appearing in the motion,

IT IS ORDERED denying Appellant's Motion to Strike portions of Appellee's memorandum.

(1) Facts.

Appellant, Adam Morales, was charged by long-form misdemeanor complaint with the crime of Assault, a class 3 misdemeanor offense in violation of A.R.S. Section 13-1203(A)(3). The assault was alleged to have occurred within the City of Phoenix on or about April 19, 2002. The victim was Eddie Mendoza. Appellant entered a plea of not guilty and requested a jury trial. The request for a jury trial was denied October 28, 2002 by Judge Stephen Lea (Phoenix Municipal Court Judge), and Appellant's Motion for Reconsideration (of the order denying his request for a jury trial) was denied November 21, 2002 by Judge Deborah Griffith (also a Phoenix Municipal Court Judge). Appellant's case proceeded to trial without a jury and Appellant was found guilty at the conclusion of the trial. Appellant was sentenced to serve two (2) days in jail, but the jail sentence was suspended contingent upon Appellant's successful completion of a counseling program. Appellant has filed a timely Notice of Appeal in this case.

(2) Appellant's Request for A Jury Trial.

Appellant requested a jury trial, having been charged with Assault, a class 3 misdemeanor offense. Appellant contends the trial court erred in denying his original motion and the motion for reconsideration. Appellant urges this court to ignore recent decisions of Arizona appellate courts, and reject the principle of *stare decisis* because the "reasons for prior decisions are clearly erroneous or manifestly wrong."[1]

The Federal law is not helpful in regard to the issue of Appellant's entitlement to a jury trial. The United States Constitution requires that if a crime is punishable by more than six (6) months of incarceration, it is not a petty offense and the accused must be afforded the right to a jury trial.[2]

Arizona has in fact, extended the right of a jury trial much further than that guaranteed by the United States Constitution.[3] Article II, Section 23[4] of the Arizona Constitution guarantees the right to trial by jury in criminal cases for "serious" rather than "petty" offenses.[5] The Arizona

[1] Appellant's Opening Memorandum at page 9.
[2] Lewis v. United States, 518 U.S. 322, 116 S.Ct. 2163, 135, L.Ed.2d 590 (1996); Blanton v. North Las Vegas, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989).
[3] State ex rel. McDougall v. Strohson, 190 Ariz. at 120, 945 P.2d at 1251.
[4] Providing in relevant part that the right to trial by jury shall remain inviolate.
[5] State ex rel. Dean v. Dolny, 161 Ariz. 297, 778 P.2d 1193 (1989).

Supreme Court in McDougall[6], listed four factors to evaluate, in determining the right to a jury trial in the State of Arizona. The first three factors are found in Rothweiler v. Superior Court[7]:

1. The length of possible incarceration;
2. Its relationship to common law crimes.
3. The moral quality of the act charged (sometimes referred to as the "moral turpitude" issue;

The fourth consideration comes from Dolny[8] and requires that the Court evaluate whether additional serious or grave consequences might flow from the conviction.

The length of possible incarceration in this case is thirty (30) days jail,[9] which is the maximum possible sentence for all class 3 misdemeanors, and the maximum fine is $500.00.[10] This factor alone does not entitle Appellant to a jury trial as defendants charged for class 1 misdemeanors such as child abuse[11] or disorderly conduct[12] are not entitled to trials by jury.

At common law, misdemeanor assault was the equivalent of simple battery, and it did not require a jury trial.[13] Noting that Arizona has never extended the right to jury trial to misdemeanor assault cases, the Arizona Supreme Court in McDougall, followed suit with crimes designated under domestic violence, A.R.S. Section 13-3601, which include misdemeanor assault and criminal damage.[14]

An evaluation of the moral quality of the act charged requires this Court to consider whether assault offenses involve "moral turpitude", or alternatively, whether additional serious or grave consequences might flow from one's conviction.[15] Acts of "moral turpitude" are those which "adversely reflect on one's honesty, integrity, or personal values."[16] Examples include indecent exposure[17], solicitation of prostitution[18], perjury[19], forgery[20], and

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[6] State ex rel. McDougall v. Strohson, 190 Ariz. 120, 124-25, 945 P.2d 1251, 1255-56 (1997).
[7] 100 Ariz. 37, 410 P.2d 479 (1966).
[8] 161 Ariz. 297, 778 P.2d 1193.
[9] See A.R.S. Section 13-707(A).
[10] A.R.S. Section 13-802(C).
[11] Bazzanella v. Tucson City Court, 195 Ariz. 372, 988 P.2d 157 (1999).
[12] State ex rel. Baumert v. Superior Court, 127 Ariz. 152, 618 P.2d 1079 (1980).
[13] Bruce v. State, 126 Ariz. 271, 614 P.2d 813 (1980); Goldman v. Kautz, 111 Ariz. 431, 531 P.2d 1138 (1975); O'Neill v. Mangum, 103 Ariz. 484, 445 P.2d 843 (1968).
[14] State ex rel. McDougall v. Strohson, 190 Ariz. at 122-23, 945 P.2d at 1253-54.
[15] Benitez v. Dunevant, 198 Ariz. 90, 95, 7 P.3d 99, 104 (2000).
[16] State ex rel. Dean v. Dolny, 161 Ariz. at 300 n.3, 778 P.2d at 1196 n.3.
[17] City Court of Tucson v. Lee, 16 Ariz. App. 449, 494 P.2d 54 (1972).
[18] In re Koch, 181 Ariz. 352, 890 P.2d 1137 (1995).
[19] Harris v. State, 41 Ariz. 311, 17 P.2d 1098 (1933).
[20] Id.

fraud.[21] Misdemeanor offenses that do not involve "moral turpitude" include selling liquor to a minor[22], child abuse[23], animal cruelty[24], disorderly conduct[25], and most notably, simple assault[26] and assault designated as domestic violence.[27] The court in Benitez shed some light in distinguishing offenses involving "moral turpitude" from those that lack it:[28]

> It may be said that each crime enumerated [those listed above lacking "moral turpitude"] implicates the offender's personal values, but not necessarily his moral deficiencies. Moral turpitude is implicated when behavior is morally repugnant to society. It is not implicated when the offense merely involves poor judgment, lack of self-control, or disrespect for the law involving less serious crimes.

Thus, while commission of a misdemeanor assault may reflect upon Appellant's personal values, it does not generally reflect a crime involving dishonesty, fraud or a deficiency of moral character.

Appellant's claims to a jury trial are not supported by current and relevant Arizona and Federal authorities. This Court concludes that the trial judge did not err in denying Appellant's Motion for a Trial by Jury, nor did the trial court err in denying Appellant's Motion for Reconsideration.

(3) Appellant's Notice of Change of Judge.

Appellant contends that the trial court erred in denying his request for an Automatic Change of Change made pursuant to Rule 10.2, Arizona Rules of Criminal Procedure. Prior to trial, Appellant filed a Notice of Change of Judge, seeking to remove the Honorable Deborah Griffith from presiding at his trial. Appellant's Notice of Change of Judge was disallowed.

Rule 10.4(a), Arizona Rules of Criminal Procedure provides:

> A party looses the right under Rule 10.2 to a Change of Judge when the party participates before that

[21] In re Wines, 135 Ariz. 203, 660 P.2d 454 (1983).
[22] Spitz. v. Municipal Court of Phoenix, 127 Ariz. 405, 621 P.2d 911, 914 (1980).
[23] Bazzanella v. Tucson City Court, 195 Ariz. 372, 988 P.2d 157.
[24] Campbell v. Superior Court, 186 Ariz. 526, 924 P.2d 1045 (1996).
[25] State ex rel. Baumert v. Superior Court, 127 Ariz. 152, 618 P.2d 1079.
[26] Goldman v. Kautz, 111 Ariz. at 433, 531 P.2d at 1140.
[27] State ex rel. McDougall v. Strohson, 190 Ariz. at 120, 945 P.2d at 1251.
[28] Benitez v. Dunevant, 198 Ariz. at 95, 7 P.3d at 104.

> judge in any contested matter in the case, omnibus hearing, any pretrial hearing, a proceeding under Rule 17, or the commencement of trial. A party looses the right under Rules 10.1 and 10.3 when the party allows a proceeding to commence or continue without objection after learning of the cause for challenge.

It appears from the record that Appellant appeared before Judge Griffith in November for oral argument on his Motion for Reconsideration (of the order denying his request for a jury trial). When Judge Griffith was assigned to hear the Motion for Reconsideration, Appellant did not request a change of judge. In fact, Appellant did not object in any manner. Judge Griffith ruled on Appellant's Motion for Reconsideration, clearly a contested matter in this case. Appellant waived any right to an automatic change of judge by his failure to object or assert a change of judge prior to the hearing on his Motion for Reconsideration. This Court finds no error.

(4) The Medical Records.

Appellant contends that the trial court erred in refusing to admit statements made by the victim, Eddie Mendoza, to hospital personnel and doctors after he was assaulted. Appellant asserts that this evidence was admissible pursuant to Rule 803(4), Arizona Rules of Evidence, as an exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment. However, the trial judge properly limited the scope of admissible hearsay statements to those statements relevant to the diagnosis or treatment of the victim's head injury. Appellant's contention that the victim failed to mention that he was spit upon to the doctors at the hospital has little merit or relevance. This Court concurs with the trial court's determination that the proposed evidence sought to be introduced by the Appellant had little relevant value.

(5) The State's Motion to Continue.

Appellant contends that the trial court erred in granting the State's Motion to Continue the January 21, 2003 trial date. This Court notes that when reviewing a trial judge's order granting or denying a motion to continue, an appellate court should not reverse the trial judge's ruling absent a clear abuse of discretion, and resulting prejudice to the other party.[29]

This Court has reviewed the record in this case and finds no abuse of discretion by the trial judge.

[29] See State v. Amarillas, 141 Ariz. 620, 688 P.2d 628 (1984).

(6) Sufficiency of the Evidence.

The final issue raised by the Appellant concerns the sufficiency of the evidence to warrant his conviction. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[30] All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.[31] If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.[32] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[33] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[34] The Arizona Supreme Court has explained in *State v. Tison*[35] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[36]

This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence.

IT IS ORDERED affirming the judgment of guilty and sentence imposed.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings in this case.

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[30] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey,* 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v.Brown,* 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission,* 94 Ariz. 113, 382 P.2d 226 (1963).

[31] *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

[32] *State v. Guerra*, supra; *State v. Girdler,* 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

[33] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).

[34] *Hutcherson v. City of Phoenix,* 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

[35] Supra

[36] Id. At 553, 633 P.2d at 362.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT